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UNIFORM PARTNERSHIP ACT

Prolegomena

The advantages of codifying portions of our law are stated by a well known writer upon legal topics as follows:

1. "To produce uniformity of law:
2. To state the law in a compendious form in which it will be susceptible of easier reference and more exact determination than if sought from decisions:
3. To settle uncertain questions of law without litigation.
4. To harmonize into a more consistent whole a body of doctrines, many of which have grown up, if not haphazard, at least without particular reference to one another."[1]

The history of modern codification of the common law starts with Jeremy Bentham in England, and in the United States with the efforts of David Dudley Field in New York; later extended to California and other western states through the influence of his brother, Stephen J. Field, afterwards an associate Justice of the Supreme Court of the United States.

[1]Professor Samuel Williston of Harvard Law School. The Uniform Partnership Act, with some remarks on other uniform Commercial Laws. Univ. Pa. Law Rev. Vol. 63, page 199.

Of recent years the labors of legal scholars along lines of codification have been devoted principally to commercial branches of the law. Two powerful agencies have assisted in the movement towards codification of commercial law. The one is the American Bar Association, organized in 1878, and having as one of its objects the promotion of uniformity of legislation throughout the Union. The other is the National Conference of Commissioners on Uniform State Laws, organized in 1890, and made up of commissioners appointed by the different states. It is a matter of interest to note in passing that Walter George Smith, Esq., and Judge Wm. H. Staake, both of Philadelphia, have served as Chairman of the Committee on Commercial Law of this important Commission. This Conference meets annually at the same time and place as the American Bar Association. A third factor which ought also to be mentioned in this connection is the Association of American Law Schools, which also meets annually at the same time and place.[2]

Says Professor Williston, supra.

"Codification has an ugly sound to most American lawyers. We have been trained to believe that no code can be expressed with sufficient exactness, or can be sufficiently elastic to fulfil adequately the functions of our common law. The iridescent legal utopia proposed by Bentham and his followers, in which everyone should readily know the law or be able quickly to find it by turning to a code, and in which the professional lawyer would be abolished has been proved a dream. We know, today, that law must adapt itself to changing conditions; that what is right in one time and place is not necessarily universal truth; that so long as the skein of human affairs is full of difficult tangles the law controlling those affairs

[2]See article by William Schofield. Uniformity of Law as an American Ideal. 21 Harvard Law Rev. 518. For Pa. statutes in reference to Uniform Legislation and appointment of Commissioners see Act May 23, 1901, P. L. 291, Act of March 31, 1905, P. L. 91, Act of May 8, 1909, P. L. 491, Act of May 28, 1913, P. L. 359.

cannot be single, or understood easily by uninstructed persons; that much of our law is in too vague a form to be written down; that new cases may arise tomorrow for which the common law will find an answer though neither the question nor the answer could be suggested by one who framed a code today."

In Pennsylvania, although we have not had much experience in the codification of the common law, it is a matter of interest to recall that this Commonwealth put forth the most ambitious as well as the earliest efforts towards a comprehensive codification of its statute law.

By the provisions of a set of resolutions relative to a revised code of Pennsylvania, passed March 23, 1830, P. L. 408, the Legislature of Pennsylvania resolved as follows:

"That the Governor be and he is hereby authorized and required to appoint three competent persons learned in the laws of this Commonwealth, as commissioners to revise collate and digest all such public acts and statutes of the civil code of this state, and all such British statutes in force in this state, as are general and permanent in their nature, allotting to such commissioners their parts respectively, as he shall deem fit: RESOLVED ALSO, that the said commissioners shall examine, correct and approve the separate labours of each.

AND BE IT FURTHER RESOLVED, that it shall be the duty of the revisers to carefully collect and reduce into one act, the different acts and parts of acts which from similarity of subject ought to be so arranged and consolidated; to divest the said acts of all redundant phrases and useless verbiage; to distribute and arrange the several acts systematically, under proper titles, divisions and sections; to omit in the revision all such acts or parts of acts as shall have been repealed or supplied by subsequent acts, or which may have expired by their own limitation; to suggest to the Legislature such contradictions, omissions or imperfections, as may appear in the statutes to be revised and the mode in which the same may be reconciled, supplied or amended; to designate such acts or parts of acts which ought to be repealed, and recommend the passage of such new acts or parts of acts as such repeal may render necessary; and generally it shall be the duty of the re-

visers to execute the duties hereby confided to them, in such a manner as to render the statute laws of Pennsylvania more simple, plain and perfect: PROVIDED NEVERTHELESS, that in the revision and collocation of the statutes no such change shall be made in their phraseology by which their true intent and meaning shall in any wise be impaired, altered or affected, except in those instances in which it shall be expressly intended and proposed to amend or change the existing provisions of such statutes.

AND BE IT FURTHER RESOLVED, that it shall be the duty of the persons so appointed, together with the duties enjoined by the preceding resolutions, to report whether it would be expedient to introduce any, and if any, what change in the forms and mode of proceeding in the administration of the laws.

AND BE IT FURTHER RESOLVED, that the revisers be and they are hereby directed to revise the several statutes relative to the settlement of accounts before registers, and proceedings in the Orphans' Courts, as soon as conveniently may be, and report the same for the determination of the general assembly at their next session."

The Governor, George Wolf, subsequently appointed on this commission William Rawle, Joel Jones and Thos. I. Wharton and as every Pennsylvania lawyer knows the labors of these men proved veritably monumental constituting as they do the groundwork of much of our substantive and adjective law.[8]

It was in 1846 that the people of New York by the adoption of a Constitutional Mandate, "ordered the appointment of two Commissions; one to reduce into a written and a systematic code the whole body of the law of the State; and the other to revise, reform, simplify and abridge the rules and practice, pleadings, etc., of the courts of record."

The desire to improve the law in England on commercial subjects first took form in the passage by Parliament of the Bills of Exchange Act in 1882; the next step

[8]See Volume 21 Pa. Bar Assoc. Rep. page 14 (1915).

in codification was the passage in 1890 of the Partnership Act; and the third step was the enactment in 1893 of the Sales of Goods Act.

Says Professor Williston in the article already referred to:

"All of these statutes have operated successfully in England, and all have diminished in large measure the labor of determining the law. On most questions, it is easier to obtain an answer to a question in the law of negotiable paper, sales or partnership, from the brief annotated statutes prepared by the authors of the acts, than it previously was to obtain such an answer from the large treatises which have in a great measure been rendered unnecessary."

The Commission on Uniform Laws in the United States prepared its first codification in 1895, having requested the Committee on Commercial laws to prepare a draft of a bill relating to commercial paper. This draft eventually took the form of the Negotiable Instruments Act, which was passed by our own Legislature in 1901, see the Act of May 16, 1901, P. L. 194.

Since the first codification the following bills have been drafted; The Warehouse Receipts Act, the Sales of Goods Act, the Bills of Lading Act, the Certificates of Stock Act, and the Partnership Act. The Commission also has in course of preparation a bill to render uniform the law of insurance in the various states.

Of the above drafts, the Warehouse Receipts Act became effective in Pennsylvania in the passage of the Act of March 11, 1909, P. L. 19, the Certificates of Stock Act May 5, 1911, P. L. 126, the Bills of Lading Act was approved June 9, 1911, P. L. 838, the Partnership Act March 26, 1915, P. L. 18, and the Sales Act May 19, 1915, P. L. 543.

Incongruous Elements in Partnership Law

Before entering into a discussion of the provisions of the Uniform Act it will conduce to clearer thought to remind the reader of some of the inherent difficulties in the formation of the law of partnership.

Professor Burdick sets this matter distinctly in the following language:

"A learned writer has said: "The law of partnership rests on a foundation composed of three materials; the Common Law, the Law of Merchants, and the Roman Law." It must be added that these different materials, like the iron and the clay in the image of Nebuchadnezzar's vision, do "not cleave one to another." Nor has English jurisprudence yet shown its ability to assimilate them.

This diversity of materials in the very foundation of English partnership law will constantly force itself upon our attention as we proceed with our subject. We shall discover, from time to time, not only a lack of affinity, but positive repulsion between common law principles and the usages of merchants. A single example will suffice by way of illustration.

The law of merchants recognized a partnership as an entity separate and distinct from the members composing it; such is still the mercantile conception of a firm. This quasi person holds the title to the firm property. It acquires rights and incurs obligations of its own. It may deal even with its own members, thus becoming their creditor or debtor. But the common law flouts all such notions. It refuses to personify the firm. A partnership is but an association of individuals. It cannot contract with its members, because a man cannot contract with himself. To this conflict of views is due much of the confusion and perplexity which characterize some of the branches of our partnership law."[4]

Divergent Views of Nature of Partnership

Mr. Shumaker, in his work on the Law of Partnership, discussing the nature of partnership says:

[4]Burdick on Partnership, page 2.

"Everyone is familiar with the legal fiction by which a corporation is regarded as a legal person or entity separate and distinct from its members or stockholders. The property, rights, duties, and obligations of a corporation are not the property, rights, duties and obligations of the stockholders. With a partnership, the case is exactly reversed. The firm, as such, is not regarded as having any legal existence apart from the members who compose it."[5]

The prevailing view, therefore, concerning the nature of a partnership is that it is merely an association of individuals and called the "association theory."

The entity or legal fiction view is well expressed by our Mr. Justice Williams in Clarke v. Railroad Company, when he says:

"The partnership when formed is a distinct person in law. It has its own name, its own property, and a right to contract, to sue and be sued by its firm name. The names of the persons who compose the firm should be stated on the record as descriptive of it, and to enable the court to take care of the rights of the parties growing out of cross-demands and the like; but the cause of action asserted in the firm name must belong to the firm as such. Joint tenants and tenants in common have several titles to an undivided moiety. Their possession is in common because the share of one has not been separated from that of the others, but the title of each is to the property held in common, and is for a definite part of it. Partners have no title to the partnership property for the title vests in the firm, and the interest of each member is a resulting interest, the value of which can only be ascertained by an account."[6]

A third view of the nature of a firm has been offered by Professor James Parsons in his Principles of Partnership. According to his view, partnership is a status and in support of this view he presents the following discussion:

[5]Partnership, page 97.
[6]136 Pa. 413.

"The sum of the rights and duties of the partners in the relation is called the status of partnership. The status may be created by contract, like marriage or sale. The contract is the occasion or door, and the consummation or conveyance establishes rights in rem." "Though partnership may be dissolved at will and the relation brought to a close through the act of the individual, yet the status, with all its attendant duties and prerogatives, subsists until it is terminated in a manner consistent with its original purpose." "The elevation of partnership into a status is due to the presence of a firm estate." "The partners, being merged as individuals in the firm estate, are enabled to trade in a distinct capacity." "The only qualification is that in acting as partners they bind their separate estates, and the firm creditor is not confined to the firm fund." "It is the recognition by the law of the estate that severs the partner from himself as a man."[7]

The above author rejects the mercantile or fiction theory and queries:

"What is the polarity of mind of a lawyer who advocates making a partnership by turns a corporation and a number of individuals? If he comprehended the elemental distinction of kind, he would not expose his confusion by making the suggestion, but he would disguise the proposition in the jargon of lawyers who speak of a man quo modo, a horse."

The Uniform Act

The Uniform Act was passed by the recent Legislature and approved by the Governor, the 26th day of March, 1915, being known as number 15, An Act relating to and regulating Partnerships. P. L. 18.

Dr. William Draper Lewis, late Dean, and now a professor in the Law Department of the University of Pennsylvania, has this to say concerning the origin of the Uniform Act:

"Several years ago the Conference on Uniform State Laws directed its Committee on Commercial Law to pre-

[7]Principles of Partnership (1st ed.) 286, 287.

pare the draft of an act to make uniform the Law of Partnership. The Committee committed the preliminary preparation of the draft to the late Mr. James Barr Ames, Dean of the Law School of Harvard University. Mr. Ames sought and procured permission to draft the Act on what is usually called the entity theory of partnership, and, at the time of his death the Committee were considering a draft prepared by him on that theory.

On the death of Mr. Ames, at the suggestion of individual members of the Committee, the writer submitted two drafts; one prepared on the so-called entity theory, and the other on the so-called aggregate theory of the nature of the partnership. In the preparation of these drafts, and of the last draft hereafter referred to, the writer has had associated with him Mr. James B. Lichtenberger, one time Gowen Memorial Fellow of the Law School of the University of Pennsylvania, and a member of the Philadelphia Bar. The two drafts first submitted by the writer and Mr. Lichtenberger were considered by the Committee at the meeting held at Chattanooga, Tenn., in August, 1910, and again at the meeting held in Philadelphia last February, 1911. The Committee invited to attend its meeting in Philadelphia a number of judges, law teachers, practicing members of the bar, and representatives of commercial bodies. A number of recognized experts on the law of partnership from different parts of the country were present. The opening session was devoted to the discussion of the rival theories of the nature of a partnership, the object being to enable the Committee to determine whether they should proceed with a detailed discussion of the draft drawn on the entity theory or that drawn on the aggregate theory. At the conclusion of the discussion, on the unanimous recommendation of those present, the Committee proceeded to examine the draft prepared on the aggregate theory, and subsequently passed a resolution directing me to prepare another draft on that theory for the further consideration of the Committee."[8]

[8]The Desirability of Expressing the law of Partnership in Statutory Form, University of Pa. Law Rev., Volume 60 page 93. For further discussion of the theory of partnership and the Uniform Act. see article by Williston, 63 Univ. Pa. Law Review 196; article by Judson A. Crane, 28 Harv. Law Rev. 762; reply to Mr. Crane by Lewis, 29 Harv. Law Review, 158; article by Lewis in 24 Yale Law Journal 617.

This draft constitutes the base of the present act, having been subjected to much scrutiny and discussion, continuing over several years and finally culminating in the following resolution adopted by the Conference on Uniform State Laws at Washington, D. C., October 14, 1914.

"Resolved, that the eighth tentative draft of an act to make uniform the law of partnership be, and the same is, hereby approved by the Conference of Commissioners on Uniform State Laws, and it is recommended to the legislatures of all of the states for adoption by them."

This last draft is the one which constitutes our Act of the 26th of March, 1915.

In discussing the Uniform Act, we will call attention to its general scope and extent and later take up particular provisions wherein there has been a change in the law of partnership in this State as it had been evolved by our courts or modified by legislative enactment.

Subdivisions

The Act is entitled "An Act relating to and regulating Partnership," and consists of seven parts, the latter in turn embracing a total of forty-six sections, as follows:

Part I. Preliminary Provisions in five sections.

Part II. Nature of a Partnership in three sections.

Part III. Relations of Partners to Persons dealing with the Partnership in seven sections.

Part IV. Relations of Partners to One Another in six sections.

Part V. Property Rights of a Partner in five sections.

Part VI. Dissolution and Winding Up in fifteen sections.

Part VII. Miscellaneous Provisions in three sections giving the time when the act is to go into effect, and providing for the repeal of specific acts and parts of acts, likewise provisions setting forth the specific fact that cer-

tain acts and parts of acts are not repealed by the act under discussion.

General Remarks

Professor Williston has this to say concerning the chief difficulties in the law of partnership which are met by the provisions of the Uniform Act:[9]

"The two principal difficulties in the administration of partnership law under existing decisions arise from:

1. The right of a partner as joint owner in specific partnership property; and,
2. The settlement of the claims of different classes of creditors when the business is continued but the personnel of the partnership changes.

In the Uniform Partnership Act the first difficulty is solved, not by asserting that the partnership as an entity owns the specific property, but by treating the partners as holding the property by a special kind of tenancy—tenancy in partnership, and defining the incidents of that tenancy in such a way as to meet the difficulties of the problem. Joint tenancy and its incidents were doubtless created by custom, and by the courts, to meet the practical necessities that were felt in co-ownership of feudal Estates. Difficulties have arisen in the law of partnership by trying to fit the incidents of a kind of co-ownership which arose out of different conditions into the situation which arises in partnership. By giving appropriate incidents to tenancy in partnership the draftsman of the act has avoided possibilities of confusion and impractical results, without making a fundamental change in existing law.

Thus the interest of a partner in a specific piece of property belonging to the firm is not subject to attachment in the Uniform Act, nor can a partner assign his interest in such a piece of property except in connection with an assignment of rights of all the partners in that property.

The second difficulty in the administration of partnership law has been met by recognizing the fact that a business may be a single and continuing business though

[9]The Uniform Partnership Act, University of Pa. Law Review, Volume 63 page 211.

an additional member of the firm may be taken in or one of the original members dropped out. The act provides that when a business is continued without liquidation, though the personnel of the firm conducting the business may change, all the creditors of the different partnerships are creditors of the partnership which continues the business and all have an equal right in the property embarked in the business. Under the existing law that property belongs to the last firm, which results in extreme hardship to the creditors who have extended credit before the last change in the personnel of the firm. Courts have endeavored to modify this hardship by declaring in many cases that the transfer of the property to the last firm was in fraud of the creditors of the preceding firm. The resulting practical situation has been one of extreme doubt where it has been hitherto and it still is extremely difficult to determine the rights of the various creditors."

The learned draftsman sets forth the following points of merit in the Act:[10]

"The merit of the proposed Act depends upon: First: Whether it states the law in simple, clear language; Second: The extent to which it renders certain existing uncertainties; Third: Whether the changes which it introduces into the law are beneficial."

The Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws have issued a copy of the Uniform Act with Explanatory Notes under date of October 14, 1914, at which time the final draft of the Act was adopted. This copy of the Act is prefaced by an Introductory Note in which, inter alia, the following observation is made:[11]

"Uniformity of the law of partnerships is constantly becoming more important, as the number of firms in-

[10]The Uniform Partnership Act by William Draper Lewis, Volume 24, Yale Law Journal, page 621.

[11]The Uniform Partnership Act with Explanatory Notes, page 5.

creases which not only carry on business in more than one state, but have among the members residents of different states.

It is, however, proper here to emphasize the fact that there are other reasons, in addition to the advantages which will result from uniformity, for the adoption of the act now issued by the commissioners. There is probably no other subject connected with our business law in which a greater number of instances can be found where, in matters of almost daily occurrence, the law is uncertain. This uncertainty is due, not only to conflict between the decisions of different states, but more to the general lack of consistency in legal theory. In several of the sections, but especially in those which relate to the rights of the partner and his separate creditors in partnership property, and to the rights of firm creditors where the personnel of the partnership has been changed without liquidation of partnership affairs, there exists an almost hopeless confusion of theory and practice, making the actual administration of the law difficult and often inequitable.

Another difficulty of the present partnership law is the scarcity of authority on matters of considerable importance in the daily conduct and in the winding up of partnership affairs. In any one state it is often impossible to find an authority on a matter of comparatively frequent occurrence, while not infrequently an exhaustive research of the reports of the decisions of all the states and the federal courts fails to reveal a single authority throwing light on the question. The existence of a statute stating in detail the rights of the partners inter se during the carrying on of the partnership business, and on the winding up of partnership affairs, will be a real practical advantage of moment to the business world."

Nature of a Partnership

It has already been pointed out that three divergent views of a partnership have been held by judges and law writers, viz: The common law or aggregate theory, the mercantile or legal person theory and the status theory.

Much time was expended by the Committee in determining which theory ought to be followed in the Uniform Act.

Section 6 provides as follows:

1. "A partnership is an association of two or more persons to carry on as co-owners a business for profit.

2. But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this act, unless such association would have been a partnership in this State prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith."

Much space has been devoted in the magazine articles cited concerning the theory of partnership which has been adopted by the language of the Act. The learned draftsman and the Committee apparently are of the opinion that the common law theory has been adopted. To this assumption Mr. Judson A. Crane in his article in the June number 1915 of Harvard Law Review takes serious exception and argues that the legal person theory or so called mercantile view should have been adopted and in fact has been unconsciously recognized in the very terms of the act.

It appears to the writer that the true version of the matter is that neither the aggregate or common law theory nor the legal person theory has actually been adopted but that without really giving credit the terms of the act are only explicable by a reference to the status theory already referred to[12] as advanced by Professor Parsons.

Professor Williston in one of his articles[13] reaches practically the same conclusion although giving credit to the entity or legal person theory in this language:

"But though the entity theory as a logically consistent theory is not followed in the Uniform Partnership Act, the main advantages of that theory are nevertheless attained; the chief reason for the popularity of the entity view is that it avoids certain difficulties into which the common law

[12]See note 7, supra.

[13]University of Pa. Law Review, volume 63, page 210.

has floundered in dealing with the partnership property, especially with reference to creditors."

Section 8 of the Act provides as follows:

1. "All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership, is partnership property.
2. Unless the contrary intention appears, property acquired with partnership funds is partnership property.
3. Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.
4. A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears."

Mr. Crane in considering the above section argues that its language would seem to make the partnership as such the subject of rights, and thus a legal person. He refers to cases in which the right has been denied to take legal title to real estate in the partnership name, the ratio decidendi being that only a legal person can take a title to real estate and that the partnership was not a legal person.

Section 10 subdivision 1 provides as follows:

"Where title to real property is in the partnership name any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph 1 of section nine, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value, without knowledge that the partner, in making the conveyance, has exceeded his authority."

In this same connection sections 24, 25 and 26 may be quoted and they read as follows:

"Section 24. The property rights of a partner are (1) his rights in specific partnership property, (2) his

interest in the partnership, and (3) his right to participate in the management.

Section 25. (1) A partner is co-owner with his partners of specific partnership property, holding as a tenant in partnership.

(2). The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable, except in connection with the assignment of the rights of all partners in the same property.

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

Section 26. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

The legal and practical result of the aforegoing sections may be shown, in large part, by the following illustrations.

A, B, & C associate themselves as partners to carry on in Carlisle and vicinity the business of buying land and selling the same in bulk or by subdivision. The firm does business under the name and style of Carlisle Land Company.

Each member of the firm contributes the sum of $10,000 to capital. Of the total capital $30,000, the sum of $20,000 is used in acquiring a tract of land to be subdivided into building lots. The $10,000 remaining is devoted as working capital for the development of the tract. The legal title to the land is taken in the name of Carlisle Land Company.

A, B & C are recognized under the sections quoted as the legal owners of the land, holding the title to the same, however, as tenants in partnership, using the name of Carlisle Land Company as a convenient designation of what Dean Lewis calls the grouping of activities[14] but which appears to be simply another way of arriving at Professor Parson's theory already alluded to. There is no recognition by the law of the Carlisle Land Company as an entity or legal person but there is, by virtue of the association of A, B & C as partners, a distinct stamp placed upon the partnership property or to put it directly there is a peculiar status or condition placed upon the partners in their relation to the partnership property and their rights therein. The partner can only deal with the partnership property for partnership purposes. Furthermore, a partner's separate creditor cannot affect the specific partnership property and on the death of a partner his right in the specific partnership property becomes extinct, the legal title vesting solely in the survivor. Thus there is no subject matter upon which any dower, curtesy or other right of widows, husbands, heirs or next of kin can attach in the case of real estate. A fee simple title is vested by the terms of the statute without the use of words of inheritance and if it is desired that a lot of ground be conveyed this may be done by any one of the partners executing and acknowledging in the name of the partnership a deed of conveyance. This occurs by virtue of the terms of Section 9, (1) as follows:

"Every partner is an agent of the partnership for the

[14]29 Harv. L. Rev. 158.

purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority."
And the provisions of Section 10 (1) already quoted.

Let us suppose in the illustration that A becomes separately indebted. What remedy has his creditor against his interest in the partnership?

As already seen the corpus of the partnership estate is immune from attacks of the separate creditors of the respective partners.

Sec. 28, (1) provides:

"On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require."

Let us suppose in the illustration given that the partnership is to continue for five years and C dies before the end of the term, thus working a dissolution of the firm.

Section 38, (1) provides:

"When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied

to pay in cash the net amount owing to the respective partners."

The legal title to the firm property would devolve upon A and B and they would be the liquidating partners. Their duty would be to reduce the partnership estate to cash, pay the debts, advances by partners, return to each partner or his representative the capital contributed and divide the surplus as profits.

Again let us suppose that partner B sells out to X and the business is continued by A, X and C and let it be further imagined that C sells out to Y and the business is continued by A, X and Y. The latter firm goes into insolvency. There are creditors of the original firm A, B and C, also of A, X and C, and of A, X and Y.

How shall the creditors participate?

Sec. 41, (1) provides:

"When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business."

From the aforegoing excerpts and illustrations it is apparent that the general theory of partnership as hitherto held in Pennsylvania remains the same, for the entity view of Mr. Justice Williams as expressed in Clarke v. Railroad Co., supra. can not be said to represent the prevailing doctrine.[15] The partners, as individuals are recognized as owning collectively the assets of the business and for the purpose of carrying forward uninterruptedly the object of its formation.

[15]Furthermore, the remarks were dicta. See 29 Harv. L. Rev. 180.

Says the learned draftsman in the note to Sec. 25. (1):

"One of the present principal difficulties in the administration of the law of partnerships arises out of the difficulty of determining the exact nature of the rights of a partner in specific partnership property. That the partners are co-owners of partnership property is clear; but the legal incidents attached to the right of each partner as co-owner are not clear. When the English courts in the seventeenth century first began to discuss the legal incidents of this co-ownership, they were already familiar with two other kinds of co-ownership, joint tenancy and tenancy in common. In joint tenancy on the death of one owner his right in the property passes to the other co-owners. This is known as the right of survivorship. The incident of survivorship fits in with the necessities of partnership. On the death of a partner, the other partners and not the executors of the deceased partner should have a right to wind up partnership affairs. (See Clause (d), infra). The early courts, therefore, declared that partners were joint tenants of partnership property, the consequence being that all the other legal incidents of joint tenancy were applied to partnership co-ownership. Many of these incidents, however, do not apply to the necessities of the partnership relation and produce most inquitable results. This is not to be wondered at because the legal incidents of joint tendency grew out of a co-ownership of land not held for the purposes of business. The attempt of our courts to escape the inequitable results of applying the legal incidents of joint tenancy to partnership has produced very great confusion. Practically this confusion has had a more unfortunate effect on substantive rights when the separate creditors of a partner attempt to attach and sell specific partnership property, than when a partner attempts to assign specific partnership property, not for a partnership purpose but for his own purposes."

Let us examine a few Pennsylvania cases which will throw light on the provisions of the Uniform Act above quoted.

In Foster's Appeal[16] the question presented to the

[16] 74 Pa. 391, per Sharswood, J.

Court was: when real estate has been held as partnership stock, the firm dissolved by the death of one of the members, a settlement and balance ascertained to be due by the surviving partner to the estate of the deceased, is such balance as far as derived from the sale of the realty to be distributed as real or personal estate?

The widow of the deceased partner as appellant claimed one third absolutely as personal estate. Held, that the balance was to be considered as real estate. It was even said in this case that the surviving partner as such could not sell the real estate in conjunction with the personalty.

Says the Court:

"As regards the power of disposition, land held as partnership stock is not subject to the rule which makes each partner the agent of the firm."

In Leaf's Appeal[17] A and others formed a partner ship to engage in the iron business. The articles of partnership stipulated that death should not dissolve the firm but that dissolution should only occur by the consent of all the members. A died, intestate, leaving a widow and children. Held, that the widow took a one-third interest absolutely, at least, during the existence of the firm.

Concerning the contention that the deceased partner's interest was real estate, the Court said:

"Whenever a dissolution shall be established, and a final settlement of accounts shall take place, the positions contended for, and the reasoning by which they are enforced, will become entirely applicable, and will exercise a very potent and possibly a controlling influence, upon the questions which will then arise between the present litigants or those who may succeed them."

According to the above ruling and Foster's Appeal, supra, the estate of A could not be finally settled until the dissolution of the firm and on the other hand if upon dis-

[17]105 Pa. 505.

solution and settlement of the firm's accounts a balance in the form of real estate remained, the widow and heirs of A would have to join the surviving partners in a deed of conveyance in order to give a good title.

In Account of C. H. Welles,[18] it was held that where all the assets of the partnership were sold by consent of all the partners, a balance on settlement of accounts being in the shape of real estate, nevertheless, for purposes of distribution in the estate of a deceased partner, was to pass as real estate despite its sale.

The questions in the above cases are now settled by Sections 25, 26 and 38 (1) above quoted. One of the most perplexing and serious problems in the law of partnership involving the rights of separate creditors of the partners in cases of execution and levy upon the shares of the partners in the firm property is illustrated in the well known case of Doner v. Stauffer.[19] The curious results reached by following the reasoning of Justice Gibson in this case have long annoyed the legal profession. The cases under the special fi. fa Act of April 8, 1873,[20] did not clarify matters.

Says Dean Lewis:[21]

"Thus, in Pennsylvania, prior to the adoption of the Uniform Act, the sheriff, at the instance of the separate judgment creditor of the partner, would levy on the debtor partner's interest in the specific partnership property attached, and sell this "interest," the purchaser having a right to a bill in equity to obtain, not what the sheriff had sold, which was the debtor partner's interest in specific partnership property, but the debtor partner's interest in the business of the partnership. See Act of April 8, 1873, Pepper & Lewis Dig. of Laws, 5620. Besides its incon-

[18]191 Pa. 239.

[19]1 P. & W. 198. See also 10 Dickinson Forum 25, Vol. 15, P. & L. Dig. Dec. Col. 25860.

[20]P. L. 65, P. & L. Dig. of Laws, 5620.

[21]29 Harv. L. Rev. 163.

sistency, the practical injustice resulting from this procedure was that it required a sale of the debtor partner's interest in the partnership before an account was had to ascertain the value of the interest. Possible purchasers, being offered something whose value was highly speculative, usually refused to bid, with the result that the interest was bought in by the judgment creditor."

The difficulties outlined are now solved by Section 28 of the Uniform Act.

Section 17 provides as follows:

"A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property."

Section 41 (1) provides as follows:

"When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business."

These sections of the Act change the law in Pennsylvania[22], and it is believed will produce more equitable results among different sets of creditors of successive partnerships which have been continued without liquidation.

Test of Partnership

One of the great difficulties in the law of partnership in the past has been to determine exactly when a partner-

[22]Frow, Jacobs & Co.'s Estate, 73 Pa. 459. Baker's Appeal, 21 Pa. 76. See also remarks of Willison under note 8 supra.

ship was formed.[23] This is purely a question of fact, and yet in the past the courts have proposed tests of a very arbitrary nature for determining this fact.

One of the tests has been the sharing in the profits of the partnership.

The common law of Pennsylvania heretofore on this subject and the statutory change are well set forth in the following remarks of Mr. Justice Fell in Wessels v. Weiss.[24]

"The agreement between the defendants made them partners at common law and in this state. The case of Waugh v. Carver, 2 H. Blackstone, 235, decided in 1793, which followed Grace v. Smith, 2 Wm. Blackstone, 998, decided in 1775, was followed and adopted to its full extent in Purviance v. McClintee, 6 S. & R. 259, in 1820. The well settled rule of Waugh v. Carver was overruled in England in 1860 by the case of Cox v. Hickman, 8 H. L. C. 268, but there has been no departure from it in this state except by legislation in 1870.

This rule has been so long established as a part of our jurisprudence that it is needless now to consider whether it is philosophical and in harmony with the principles governing the partnership relation. The departure from it in this state—and it was doubtless the wiser course—has been by legislation. The act of April 6, 1870, provides that a loan of money to an individual or a firm upon an agreement to receive a share of the profits of the business as compensation for the use of the money and in lieu of interest shall not make the party loaning the money liable as a partner except as to the money loaned, provided that the agreement for the loan shall be in writing and that the party shall not hold himself out as a general partner. This legislation distinctly recognized the rule as it had existed in this state for fifty years and in England from 1775 to 1860, and modified it to conform more nearly to the modern English rule of Cox v. Hickman, supra."

[23]To illustrate this difficulty, see Dunham v. Rogers, 1 Pa. 255; Hart v. Kelley, 83 Pa. 286, In re Gibbs' Estate, 157 Pa. 59; Fourth Street National Bank v. Whitaker, 170 Pa. 297.

[24]166 Pa. 494.

The above law is changed by the provisions of section 7 of the Act and the general question is clarified as much as possible.

Section 7 reads as follows:

"In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise.

(b) As wages of an employee or rent to a landlord.

(c) As an annuity to a widow or representative of a deceased partner.

(d) As interest on a loan, though the amount of pay ment vary with the profits of the business.

(e) As the consideration for the sale of the goodwill of a business or other property by installments or otherwise."

Powers of Partners

Section 9 of the Act sets forth the powers of partners acting as agents of the partnership and as to partnership business.

The section reads as follows:

"Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, in-

cluding the execution in the partnership name of any instrument for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership.

(b) Dispose of the good-will of the business.

(c) Do any other act which would make it impossible to carry on the ordinary business of the partnership.

(d) Confess a judgment.

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction."

The section, it will be observed, ignores the distinction between trading and nontrading partnerships which has been generally recognized in England and in most American jurisdictions.[25]

This distinction, however, was repudiated by the Supreme Court of Pennsylvania in the case of Hoskinson v. Eliot. Said the Court:[26]

"No such distinction is suggested or recognized in any adjudicated cases or text books, and there is no foundation for it in the necessities or usages of these partnerships. The necessity for borrowing money to carry on the busi-

[25]Burdick on Partnership, 193.

[26]62 Pa. 393.

ness of a manufacturing partnership may be as great as it is in order to carry on the business of one that is strictly commercial."

The test for determining the implied authority of a partner is reduced to the question of fact was the act as performed apparently for the carrying on in the usual way of the business of the partnership.

As to the acts which are specifically denied as a part of the implied authority of the partner, the law of Pennsylvania previous to the passage of this Act was in accord except as to subdivisions (d) and (e).

In Grier v. Hood[27] and in subsequent cases, it has been held that a judgment may be confessed for a partnership debt by one member of a firm, without the consent of the other members, and if the property of the firm be sold under an execution issued upon such judgment, the purchaser will take a good title.

It was also held in Gay v. Waltman[28] that one partner could bind his co-partners by submission to arbitration, not under seal, in any partnership matter.

Says Mr. Justice Mercur in the above case:

"The general rule in England and in many of our sister states, is that one partner cannot bind his co-partner by submission to arbitration. In Pennsylvania it is held that he may so bind his co-partner, by agreement not under seal, in any partnership matter."

The provisions of Section 10, subdivision 1, relative to the powers of partners over firm real estate held in the partnership and their authority to convey have been already quoted and discussed. The provisions mark a radical change in our local law. Subdivision 2 of this same section may likewise be noted in this connection.

[27]25 Pa. 430; Evans v. Watts, 192 Pa. 112; Adams v. Leeds Co., 195 Pa. 70.

[28]89 Pa. 453.

Dissolution

The subject of dissolution and winding up of partnerships occupies quite a space in the Uniform Act, there being devoted to these subjects fifteen out of the total of forty-six sections of the Act.

Much matter of uncertainty in the law has been reduced to certainty in these sections and some of the principles, especially those where a person was compelled to "take notice" of the dissolution, have been changed to more equitable conclusions.

Special note may be made of the adoption in paragraph (2) of Section 31 of the principle set forth in our own cases of Mason v. Connell[29] and Slemmer's Appeal,[30] holding that a partner may dissolve the partnership in contravention of the term agreement between the partners but suffer the penalty in damages for so doing.

Conclusion

The primary object of this article has been to bring the Uniform Act more closely to the attention of the student body and by reference to certain features of the Act and some discussion of the principles of partnership law therein set forth to thus stimulate further research and study upon the part of the reader.

This discussion does not purport to be an exhaustive treatment of the Act. Many sections and paragraphs have been left untouched. Some questions which will inevitably arise in the construction of the Act by the Courts have been in mind and may be treated in subsequent articles.

As far as Pennsylvania law is concerned, the Act provides some very welcome changes which will undoubtedly

[29] 1 Wharton, 381.
[30] 58 Pa. 168.

make partnership law more workable and more in accord with commercial thought.

No doubt there are defects in the Act. No attempt has been made, however, to disclose any defects.

We may conclude this article with the language of the severest critic the Act has had[31], who closed his criticisms with this declaration:

"The Act contains, nevertheless, many commendable features, which cannot because of lack of space be enumerated."

A. J. WHITE HUTTON.

MOOT COURT

HAROLD'S ESTATE

Decedent's Estates — Husband and Wife — Husband's Possession of Wife's Property—Presumptions

Massenger, for the appellant.
Hibbard, for the appellee.

OPINION OF THE COURT

PANNELL, J. From the facts in this case, it appears that one Harold had received, with the consent of his wife from her father's executor the sum of $1000, which was in payment of a legacy to her. Prior to his death, Harold had issued 40 checks, varying in amounts from $5 to $100, to his wife, which the distributees allege, partially paid the debt, if there was one, to the extent of $740. In the distribution of the estate by the Orphans' Court, the wife was allowed $1000 with interest from the time the husband received the money.

The first question which presents itself, is whether the husband, by the receipt of his wife's money, and with her consent, thereby created the relationship of debtor and creditor, or that of donor and donee. Prior to the Act of 1848, the wife had no separate and independent personal estate. The freedom of disposition of it was limited, encumbered, and bound by that arbitrary rule of the common law which made her property that of her husband. The common law gave him this right as incident to the marriage relation. Clevenstene's Appeal, 15 Pa. 499. But after the Act of 1848, there was a difference. The receipt of the money by the husband rested upon an opposite presumption. As the law made the money hers, it presumed it to have been received for her. So full was her right and dominion over it that she might have loaned it to her husband and his estate would have had to pay it. It is quite evident, therefore, that prior to the Act of 1848, the wife had less power and dominion over her estate than subsequent thereto. "In the first period the presumption is that the husband has received the money under and by virtue of his marital relation as his own; in the second, the presumption is the opposite, that he received it for his wife, the act of assembly having declared it hers, and for her sole and separate use." Wormley's Estate, 137 Pa. 109.

The money which the wife was to receive from her father's executor was undoubtedly part of her sole and separate estate, over which she had exclusive control and dominion. Although she consented to the receipt of it by her husband, still there was no other evidence which either affirmed or denied that he received it as a gift or a loan. Since the husband received his wife's money, the presumption is, in the absence of an agreement to the contrary, that he received it as a loan. Strock's Estate, 56 Super. 32; Hawley v. Griffith, 187 Pa. 309; Hamill's Appeal, 88 Pa. 367; Wormley's Estate, 137 Pa. 109; Krider v. Hartzell, 40 Super. 193; Young's Estate, 65 Pa. 104; Johnston v. Johnston, 31 Pa. 454. For "the mere fact of the reception of the wife's money by her husband, makes him her debtor and it requires no affirmative proof by the wife that he received it as a loan and not as a gift. On the contrary, if it is alleged afterwards, whether by the husband's heirs or by his creditors that the money was received as a gift, and not as a loan, the burden is upon those who make such allegation to prove it." Wormley's Estate, 137 Pa. 109. But the distributees have not shown any agreement to the contrary nor any evidence rebutting the presumption and justifying, even as inference that it was a gift and not a loan. Consequently, Harold by the receipt of the $1000 in question made himself liable as a debtor to his wife for that amount.

Even though the estate of Harold is indebted to the wife for the sum of $1000, still the distributees contend that the debt has been reduced by the amounts of the several checks given to the wife. They urge that they were payments on the debt and that such is the presumption, unless the same is overcome. The general rule is that when a check is drawn by one person in favor of another and paid to the latter, the presumption is that it was received on account of a debt shown to have existed at the time, and that the person alleging that it was not so received must offer proof to overcome the presumption. Strock's Estate, 56 Super. 35; Masser v. Bowen, 29 Pa. 128; Flemming v. McClain, 13 Pa. 177.

To the general class of cases involving such contested point, this rule is applicable. However, it should be limited to those controversies in which strangers are concerned and should not be invoked where an intimate relationship exists as between husband and wife. From the facts of this case, the checks ranged in amounts from $5 to $100 and were 40 in number. When we consider both the amounts and the number of the checks, it is altogether plausible to conclude that they were given to the wife for the support and maintenance of the household. Surely, it would not be reasonable to presume that every time a husband advanced money to his wife, under conditions

similar to these in the present case, that he was making a loan to her or paying off some past indebtedness, and this is especially true when the husband and wife are living together. But even if they are not living together, the presumption is the same, and perhaps there is all the more reason to presume a gift, for such action would tend to show the interest of the husband in the support and maintenance of his household. Consequently, "the intimate relationship of the parties and the generally recognized mode of dealing between husband and wife, justifies the presumption that the delivery of property by the husband was intended as a gift rather than the payment of a debt." Strock's Estate, 56 Super. 35. See also Wilson v. Silkman, 97 Pa. 509; Sparks v. Harley, 208 Pa. 166.

This rule applies to both personalty and realty and where a husband transfers either real or personal property to his wife, the presumption is that it is a gift from him to her." Waslee v. Rossman, 231 Pa. 228.

It does not appear that the distributees have rebutted the presumption, that these advances made to his wife, were gifts rather than loans. Therefore, they have not established their contention that the debt has been reduced by the amounts of the checks given to the wife.

After finding that the wife had a valid claim against the estate of her husband for $1000 and that the checks given to the wife were gifts and not loans, consequently not diminishing the amount of the indebtedness, the Court allowed the wife interest on the amount from the time the husband received the money. This was error, for as a general rule, when the wife permits her husband to use her money without any stipulation as to the terms and continues to live with him, the presumption is that the interest was used to support the family and she is entitled to a return of the principal and not the interest also. Hawley v. Griffith, 187 Pa. 309; Hauer's Estate, 140 Pa. 425.

It does not appear that the wife made any demand for interest until the bringing of this suit, and there was no agreement to the effect that interest should be paid; consequently, she could not recover any interest during the lifetime of her husband. For as stated in McGlensey's Appeal, 14 S. & R. 66, "Where a wife permits her husband to receive the profits of her separate estate, and particularly where they live together and the expenses of housekeeping are paid by him, the presumption is that it was the intention of the wife to make a gift of the profits to the husband. And there is great reason for this presumption, because the husband being in receipt of this money, may be induced to live at a greater expense than he

would otherwise have done, whereby the comforts of the wife, as well as his own, are increased." A further reason for this rule, as given in Kittel's Estate, 156 Pa. 453, "is to relieve the necessity for accounts, which in ordinary conduct of domestic affairs would be so difficult of determination. In the absence of proof to the contrary, it is presumed that the interest money on the wife's separate estate, which has been received by the husband, has been expended by him with her consent for the support of herself and family. Since there was no agreement whatever that the wife was to be paid interest for this money and besides there was no evidence which would tend towards such an inference, it must be concluded according to well established principles, that the wife was not entitled to any interest during the lifetime of her husband.

The reason for prohibiting the wife from recovering interest during the lifetime of the husband is that he is presumed to use it for the benefit of the wife and the family. But after his death must we continue to apply the rule when the fundamental reason therefor no longer exists. It does not seem reasonable and justifiable to continue to apply this presumption and privilege to the personal representatives or distributees of the husband. There is good and sufficient reason for limiting this exemption to those cases of intimate relationship such as exist between husband and wife, and upon his death, the husband's estate should expect no more favors and leniency from the widow than from strangers. Therefore, the wife should be allowed interest on the money from the time of her husband's death. In Wormley's Estate, 137 Pa. 112, "the wife could not claim interest on the money as she undoubtedly did permit her husband the use of it without any claim of interest and indirectly, at least, shared in the benefit derived from its use. She is, of course, entitled to interest from the time of his death and that must be allowed." Likewise, "where a wife has a separate estate and it is shown that the husband has received and appropriated a portion of such estate, it is a debt to the wife, and he must repay it to her, but without interest unless a contract to pay interest is shown; interest runs, however, from the time of his death." Brandt's Estate, 11 Lanc. 321. Consequently, the wife is entitled to interest from the date of her husband's death and not from the time he received the money.

OPINION OF SUPERIOR COURT

The judicious and learned opinion of the Orphans' Court makes a lengthy discussion here unnecessary.

The husband received $1000 belonging to the wife. No explanation of the act is tendered. He must be deemed to have received it

for her. He might have received it as a gift. But the burden of showing that he did was upon those who alleged that he did. They have not done so.

The presumption is that he was expected by her, to use the proceeds of the money, the interest, in the support of the family. He is not therefore liable for interest prior to his death.

His support of the family ceased with his death. It became then a duty of the administrator to pay interest on the money from the time of his death until the repayment of the money.

The putting of moneys, on 40 different occasions, into his wife's hands by means of checks varying from $5 to $100, must be deemed in the absence of evidence, to have occurred, in pursuance of the husband's duty to support the family, and to enable the wife to make the necessary purchases therefor. Appeal dismissed.

ROSS v. CLARK

Statute of Frauds—Act April 26, 1855 P. L. 308—Mortgage—Mechanic's Lien

STATEMENT OF FACTS

Harrison gave to Clark a mortgage for $6,000, payable in instalments. After the record of this mortgage, and after $2,000 had been paid by the mortgagee Clark, to Harrison, Harrison caused a house to be erected on the mortgaged premises, by Ross. Ross would have filed a lien for the contract price $4,000 but for Clark's asking him not to, and saying that if he would not, he, Clark would see that Ross was paid. Thereupon Ross agreed not to file the lien, and the time for filing passed. This is an action for the $4,000 on Clark's oral promise.

OPINION OF THE COURT

LEOPOLD, J. We have here to decide whether or not the above facts create an obligation bringing the agreement within the Statute of Frauds and Perjuries of 1855. If the agreement is within the meaning of said statute there can be no recovery, if not, judgment must be rendered for the plaintiff.

The Statute of Frauds and Perjuries of April 26, 1855 P. L. 308 provides: "No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt or default of another, unless the agreement upon which such action shall be brought or some note or memorandum thereof shall be in writing and signed by the party to be charged therewith or some other person by him authorized."

To determine whether or not the contract is within the statute we must not look at the mere words of the promise, but we must also take into consideration the circumstances of the transaction. Hall v. Trust Co., 220 Pa. 485; Davis v. Patrick, 141 U. S. 479.

The recording of Clark's mortgage gave him a prior lien upon the premises here concerned. The title to the land however was still in Harrison and he later caused a house to be erected upon the premises. This he had a just right to do. Now the plaintiff, Ross, erected the house under a contract with Harrison. Ross was not paid and clearly had the right to file a lien under the Mechanic's Lien Act. Now had Ross done what was clearly his right, namely: filed his mechanic's lien, Clark's mortgage would have lost its priority; as the mechanic's lien under the above Act clearly takes priority over any previous lien. Ross did not file his lien, and why not? Was he guilty of laches? We think not. He was not legally negligent. He refrained from filing said lien clearly in reliance upon Clark's oral promise, namely: If Ross would not file the lien he, Clark, would see that Ross was paid. Now, was this merely an oral promise on the part of Clark to pay the debt of another? In our opinion it was far more. As a result of Ross' not filing said lien, Clark received a benefit and a very direct benefit. His mortgage still remained : first lien upon the premises, and this we thing was Clark's main object in requesting Ross not to file his lien.

In Nugent v. Wolfe, 111 Pa. 471, the court says: "When the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute." This, we think, is directly applicable to the case at bar. Clark's leading object was to retain his first lien and to accomplish this purpose he had of necessity to promise to pay the debt of another. The discharge of Harrison's obligation to Ross was an incidental effect.

In support of this doctrine we would cite: Nugent v. Wolfe, 111 Pa. 471; Baxter v. Hurlburt, 15 Pa. 541; Weber v. Bishop, 12 Super. 51. The facts of this iase are identical with those in the case of Silberstein v. Bernstein, 58 Sup. 375, and in reliance upon the law there established, and the sound reasoning leading to such conclusion, we would follow the precedent there established.

We would therefore render a verdict in favor of the plaintiff.

OPINION OF SUPERIOR COURT

Notwithstanding the elaborate and ingenious argument of the counsel for the defendant, the opinions of the court below and of the Superior Court in the case of Silberstein v. Bernstein, 38 Super. 375, vindicate the decision made in this case.

The judgment is therefore affirmed.

BOOK REVIEW

The Law of Unincorporated Associations and Similar Relations, by Sydney R. Wrightington, of the Boston Bar. Little, Brown & Co., 1916, Boston.

This work deals with associations that are not ordinary partnerships, nor corporations. The author, in his preface notices "that business men are reverting to unincorporated associations to carry out their purposes," and he endeavors to exhibit the law as to such associations, in so far as statute or judicial decision, has evolved it. In 140 pages he treats of Associations for Profit, in 20, Trusts, in 28, Unassociated Groups, and in 108 Non-profit Associations. In an Appendix of Forms, notable agreements are given verbatim; such as that involved in the Standard Oil Trust, the Copley Square Trust, the Park Square Real Estate Trust, the Boston Personal Property Trust, the Boston Suburban Electric Companies, the Ludlow Manufacturing Associates, the North American Companies and others.

The subject of this volume is of very great importance, and Mr. Wrightington's treatment of it is characterized by lucidity, fulness, accuracy.

The mechanical feature of the books are all that can be desired. Good paper and clear type, make the use of it a pleasure. It is worthy of a place in the library of every practicing attorney.